COMMONWEALTH OF MASSACHUSETTS

SUPREME JUDICIAL COURT

NO. SJC-09935

BARNSTABLE COUNTY

COMMONWEALTH,
Appellee,

v.

CHRISTOPHER M. MCCOWEN,
Defendant-Appellant.

DEFENDANT-APPELLANT'S BRIEF

Robert A. George
Attorney at Law
111 Huntington Avenue
The Prudential Center
Suite 600
Boston, Massachusetts 02199
(617) 262-6900
Attorney for Defendant-Appellant

TABLE OF CONTENTS

STATEMENT OF ISSUES.....1

STATEMENT OF THE CASE.....1

SUMMARY OF ARGUMENT.....2

STATEMENT OF FACTS.....3

I. THE COURT'S ALLOWANCE OF A MEDICAL EXAMINER AND A DNA ANALYST WHO DID NOT PERFORM THE ORIGINAL EXAMINATIONS AND TESTING WAS ERROR.....16

II. THE COURT'S REMOVAL OF A DEADLOCKED DELIBERATING JUROR WAS REVERSIBLE ERROR.....23

III. THE COURT COMMITTED REVERSIBLE ERROR WHEN IT FOUND MCCOWEN'S UNRECORDED STATEMENT VOLUNTARY.....33

IV. THE COURT'S DENIAL OF THE DEFENDANT'S MOTION FOR NEW TRIAL BASED UPON JUROR MISCONDUCT SHOULD HAVE BEEN ALLOWED.....39

V. THE COURT ERRED IN DENYING THE DEFENDANT'S MOTION FOR NEW TRIAL BASED ON THE COMMONWEALTH'S WITHHOLDING OF EXCULPATORY EVIDENCE.....47

VI. THE COURT ERRED IN DENYING THE DEFENDANT'S MOTION TO DISMISS THE INDICTMENTS BOTH BEFORE AND AFTER THE PRESENTATION OF EVIDENCE.....55

VII. MEDIA FRENZY MANDATED CHANGE OF VENUE/ SEQUESTRATION.....57

VIII. WHETHER THE COURT ERRED IN THE RESTRICTION OF DR. BROWN'S TESTIMONY AND ADMISSION OF BAD ACTS EVIDENCE.....59

IX. THESE VERDICTS SHOULD BE REVERSED PURSUANT TO G.L. c. 278 §33E.....62

CONCLUSION.....65

ADDENDUM

CERTIFICATE OF COMPLIANCE

TABLE OF CASES

Commonwealth v. DiGiambattista
442 Mass. 423 (2004).....7,34,35,37

Commonwealth v. Garrey
436 Mass. 422 (2002).....14,23,32-3

Commonwealth v. Connor
392 Mass. 838 (1984).....14,26-9

Commonwealth v. Haywood
377 Mass. 755 (1979).....14,23,26-27,29

Crawford v. Washington
541 U.S. 36, 42 (2004).....17

Melendez-Diaz v. Massachusetts
129 S. Ct. 2527 (2009).....17-22.53

Commonwealth v. Nardi
452 Mass. 379 (2008).....17-8,20

Commonwealth v. Avila
454 Mass. 774 (2009).....17

Commonwealth v. Gonsalves
445 Mass. 1 (2005).....18

Commonwealth v. Diaz
453 Mass. 266 (2009).....19,34-5,38

Chapman v. California
386 U.S. 18 (1967).....19

Commonwealth v. Pena
455 Mass. 1 (2009).....20

People v. Dungo
98 Cal. Rptr.3d 702 (Cal. App. 3d Dist. 2009).....20,53

Commonwealth v. Verde
444 Mass. 279 (2005).....21-2

Commonwealth v. Connolly
454 Mass. 808 (2009).....22

United States v. Lamb
529 F. 2d. 1153 (9th Cir. 1975).....26

People v. Compton
490 P. 2d. 537 (Cal. 1976).....28

Commonwealth v. Webster
391 Mass. 271 (1984).....29

Commonwealth v. Tennison
440 Mass. 553 (2003).....30-2

Commonwealth v. Jackson
376 Mass. 790 (1978).....30

Commonwealth v. Koumaris
440 Mass. 405 (2003).....30

Commonwealth v. Francis
432 Mass. 353 (2000).....30-1

Commonwealth v. Kamara
422 Mass. 620 (1996).....28

Commonwealth v. LeBlanc
443 Mass. 549 (2001).....30

Mincey v. Arizona
437 U.S. 385 (1978).....30,34

Commonwealth v. Mandile
397 Mass. 410 (1986).....34

Stephan v. State
711 P.2d. 1156 (1985).....35

Commonwealth v. Vao Sok
435 Mass. 473 (2000).....36

Miranda v. Arizona
384 U.S. 436 (1966).....36

Commonwealth v. Marshall
338 Mass. 460 (1959).....38

Commonwealth v. Haywood
247 Mass. 16 (1923).....38

Commonwealth v. Anderson
445 Mass. 195 (2005).....38

Commonwealth v. Fidler
377 Mass. 192 (1979).....39,44-45

Commonwealth v. Laguer
410 Mass. 89 (1991).....37,43-5

United States v. Henley
238 F. 3d 1111 (9th Cir. 2001).....40

Tobias v. Smith
468 F.Supp. 1287 (W.D.N.Y. 1979).....40

State v. Johnson
2001 WL 694730 (S.D. June 20, 2001).....40

United States v. Heller
785 F.2d. 1524 (11th Cir. 1986).....40

United States v. Hendrix
549 F.2d 1225 (9th Cir. 1977).....40

Wright v. United States
559 F. Supp. 1139 (E.D.N.Y. 1983).....40

Dyer v. Calderon
151 F. 3d 970 (9th Cir. 1998).....41

Commonwealth v. Hunt
392 Mass. 28 (1984).....41

Commonwealth v. Casey
442 Mass. 1 (2004).....41

Irvin v. Dowd
366 U.S. 717 (1961).....41,58

Commonwealth v. Tavares
385 Mass. 140 (1982).....41,44

Parker v. Gladden
385 U.S. 363 (1966).....42

Clark v. United States
289 U.S. 1 (1933).....42

Burton v. Johnson
948 F.2d 1150 (10th Cir. 1991).....42

McDonough Power Equipment, Inc. v. Greenwood
464 U.S. 548 (1984).....43

Commonwealth v. Amirault
399 Mass. 617 (1987).....45

Commonwealth v. Kincaid
444 Mass. 381 (2005).....45

United States v. Howard
506 F.2d 865 (5th Cir. 1975).....45

United States v. Blair
444 F. Supp. 1273 (D.D.C. 1978).....45

Commonwealth v. Vardinski
438 Mass. 444 (2003).....49,59-60,63

Commonwealth v. Martin
427 Mass. 816 (1998).....48

Commonwealth v. Tucceri
412 Mass. 401 (1992).....48,54-5

Commonwealth v. Neal
392 Mass. 1 (1984).....48

Brady v. Maryland
373 U.S. 83 (1963).....48-9

United States v. Agurs
427 U.S. 97 (1976).....49

United States v. Bagley
473 U.S. 667 (1985).....49

Commonwealth v. Healey
438 Mass. 672 (2003).....49

Commonwealth v. Pring-Wilson
448 Mass. 718 (2007).....51

Commonwealth v. Gallarelli
399 Mass. 17, 20-22 (1987).....54

Commonwealth v. Wilson
381 Mass. 90, 109 (1980).....54

Commonwealth v. Schand
420 Mass. 783, 787-788 (1995).....54

Commonwealth v. Woodward
157 Mass. 516 (1893).....55

Commonwealth v. Freeman
407 Mass. 279, 282 (1990).....56

Commonwealth v. Lammi
310 Mass. 159, 163-164 (1941).....56

Commonwealth v. O'Dell
392 Mass. 445 (1984).....57

Commonwealth v. Angiulo
415 Mass. 502, 515 (1993).....57

Commonwealth v. Jackson
388 Mass. 98, 109 (1983).....57

Commonwealth v. Bianco
388 Mass. 358 (1983).....57

Groppi v. Wisconsin
400 U.S. 505 (1971).....58

Rideau v. Louisiana
373 U.S. 723 (1963).....58

Commonwealth v. Blackburn
354 Mass. 200 (1968).....58

Commonwealth v. Smith
353 Mass. 487 (1968).....58

Commonwealth v. Aldoupolis
390 Mass. 428 (1983).....58

Commonwealth v. Civello
39 Mass. App. Ct. 373 (1995).....59-60,63

Commonwealth v. Russ
232 Mass. 58 (1919).....59-60

Commonwealth v. Chalifoux
362 Mass. 811 (1973).....60

Commonwealth v. Turner
393 Mass. 685 (1985).....60-1

Commonwealth v. Leavitt
17 Mass.App.Ct. 585 (1984).....61

Commonwealth v. Spare
353 Mass. 263 (1967).....61

Commonwealth v. Homer
235 Mass. 526 (1920).....61

Commonwealth v. Errington
390 Mass. 875 (1984).....61

United States v. Lavelle
751 F.2d. 1226 (D.C. Cir. 1985).....61

Commonwealth v. Banuchi
335 Mass. 649, 654 (1975).....61

Commonwealth v. Holmes
157 Mass. 223, 239-240 (1982).....61

Commonwealth v. Toney
385 Mass. 575 (1982).....62

Commonwealth v. Chaisson
383 Mass. 183 (1981).....62

Commonwealth v. Almon
387 Mass. 599 (1982).....62

Commonwealth v. Cartagena
386 Mass. 285 (1982).....62

Commonwealth v. Wright
411 Mass. 678, 681 (1992).....62

Commonwealth v. Sylvester
400 Mass. 334, 336 (1987).....62

Commonwealth v. Selby
420 Mass. 656, 663 (1995).....62

Commonwealth v. Williams
388 Mass. 846, 856 (1984).....62

United States v. Rohrbach
813 F.2d 142, 144 (8th Cir. 1987).....63

Commonwealth v. Sansone
252 Mass. 71 (1925).....63

Bell v. Wolfish
441 U.S. 520 (1979).....64

Turner v. Safley
482 U.S. 78 (1987).....64

Cacicio v. Secretary of Pub. Safety
422 Mass. 764 (1996).....64

Commonwealth v. Dubose
(SUCR2007-10019 2/25/08).....64

Commonwealth v. Buccella
434 Mass. 473 (2001).....64-5

OTHER AUTHORITIES

G.L. c. 234 §26B.....14,26

Article 12, Massachusetts Constitution.....16,33,50,64

G.L. c. 234A §74.....33

Sixth Amendment, United States Constitution.....16,40

Developments in the Law--Race and the Criminal Process: VII: Racist Juror Misconduct During Deliberation. (1988) 101 Harv. L. Rev. 1595.....40

Justice Denied: Racial Bias in Jury Behavior
Keene, D.L., Ph.D. & Handrich, R.R., Ph.D. (2002)...,,.44

Mass.R.Crim.P.30(b).....47

G.L. c. 213, §5.....55

Mass.R.Crim.P.37(b)(1).....57

G.L. c. 278, §33E.....61,65

Fourth Amendment, United States Constitution.....64

STATEMENT OF ISSUES

A. Whether the court's allowance of a medical examiner and a DNA analyst who did not perform the original examinations and testing was error.

B. Whether the court's removal of a deadlocked deliberating juror was reversible error.

C. Whether the court committed reversible error when it found McCowen's unrecorded statements voluntary.

D. Whether the court's denial of the defendant's motion for new trial based upon juror misconduct should have been allowed.

E. Whether the court erred in denying the defendant's motion for new trial based on the Commonwealth's withholding of exculpatory evidence.

F. Whether the court erred in denying the defendant's motion to dismiss the indictments both before and after the presentation of evidence.

G. Whether media frenzy mandated change of venue/sequestration.

H. Whether the court erred in the restriction of Dr. Brown's testimony and admission of bad acts evidence.

I. Whether these verdicts should be reversed pursuant to G.L. c. 278 §33E.

STATEMENT OF THE CASE

On November 16, 2006, Christopher McCowen was convicted of first-degree murder, aggravated rape and aggravated burglary by a Barnstable County jury. Tr. 3856-57.[1] He was sentenced to natural life imprisonment without the possibility of parole at MCI-Cedar Junction. Tr. 3874. He appealed from those convictions

[1] Tr.refers to the trial transcript; PTH to the Pretrial Hearings; MNTR to the Post Trial Hearings; App. to the Appendix References.

on November 16, 2006 App. 52. That appeal, along with the appeal of the denial of post-trial motions for relief, brings this matter before this Court. App. 53,54.

SUMMARY OF ARGUMENT

A plethora of errors led to the defendant's convictions. The trial court wrongly allowed a Commonwealth pathologist to testify to an absent medical examiner's substantive findings, and a lab analyst to the testing and findings of another. The court unilaterally, without a hearing, illegally removed a juror after a deadlock on the sixth day of deliberations. The accused, without food and under the influence of narcotics, was illegally questioned after his arrest without counsel for over six hours without the interrogation being recorded. Racial animus and other juror misconduct poisoned deliberations. The Commonwealth withheld exculpatory evidence despite the defense's specific requests. These convictions should also be reversed based on the trial court's improper denials of the defendant's motions to dismiss, to suppress, to change venue and its wrongful allowance of bad acts evidence and restricting expert testimony.

STATEMENT OF FACTS

On January 6, 2002, Timothy Arnold called 911 to report he'd found his neighbor Christa Worthington dead

inside her Truro home. Tr. 624. Until 2001, Worthington was sexually involved with Arnold, an unemployed author/teacher living with his parents nearby. Tr. 590,651-2. Arnold told police he believed Worthington perished after falling down the stairs. Tr. 625. The deceased's cousin, EMT Jan Worthington, was the first responder and claimed she immediately suspected her cousin was a homicide victim. Tr. 861,864-5. Soon after, additional EMTs, Truro and Massachusetts State Police and a myriad of others descended upon the scene. Tr. 874-5.

The victim was a 46-year-old fashion writer from a prominent Truro family who'd worked for Vogue and Elle, and was a Vassar graduate who'd lived in New York City and Paris for years before relocating to Cape Cod. Tr. 724. She lived with her two-year-old daughter Ava, fathered by Tony Jackett, a married father of six and Provincetown shellfish warden. Tr. 595-8,728. Worthington's murder sparked a local, national, and international media frenzy, spawning a book featuring Cape & Islands D.A. Michael O'Keefe. Yet for almost forty months, the case remained unsolved.

Police suspected Arnold, who admitted to a stormy relationship with Worthington and to feeling rejected when she spurned his overtures. Tr. 670,760-80. Police

inquired about Arnold's leering at Worthington through her bedroom window, leaving fingerprints, after she ejected him from her home and about his attempt to break down her door. Tr. 743-5, 766-80. Police accused Arnold of the murder. Tr. 780. They also suspected Ava's father, Tony Jackett, Jackett's son-in-law Keith Amato and others. Tr. 728.

For more than three years, police made no arrest and located no witnesses. Responding witnesses described the victim naked from the waist down, wearing a green bathrobe, evidence never found. Tr. 617-618, 792-3, 864, 947. Palm and fingerprints were lifted from the scene, DNA from three unidentified males were scraped from under the victim's fingernails, blue-and-white fibers were recovered from Worthington's vaginal area, and multiple hairs were found at the scene. Nothing connected Christopher McCowen to the crime. Tr. 1512. Authorities swabbed DNA from the victim's vagina, breasts and a blanket used to cover her body. The blanket's DNA matched Tim Arnold's. Tr. 1489.

Over the following months, police interviewed a raft of witnesses. Within 48 hours of the murder, McCowen approached police about an unrelated matter. A trash collector who served time in Florida for non-violent theft offenses, McCowen had become an informant

on Cape Cod, providing reliable tips on the local drug world. On January 8, 2002, McCowen, not a suspect, told police about drug distribution efforts by Jeremy Frazier. Three months later, police approached McCowen to discuss the murder because Worthington's residence was on his trash collection route. He met with them willingly, saying he'd never spoken with Worthington and that their only interaction was an occasional wave. He offered his DNA, but police did not swab McCowen or speak to him again for nearly two years. McCowen remained on Cape Cod without incident. Tr. 1530-36.

On March 18, 2004, McCowen was summoned to Barnstable District Court on an unrelated matter by his probation officer, who urged McCowen to provide a DNA sample to State Police Detectives Christopher Mason and Sergeant William Burke, who suddenly materialized to collect the sample. Tr. 1542-45. Still McCowen again remained on the Cape, making no attempt to flee. Tr. 1534-36. On April 13, 2005, Mason learned McCowen's DNA matched that found on one of Worthington's breasts and immediately sought an arrest warrant. Tr. 1557. On April 14, 2005, McCowen had taken time off from work because of a leg injury and had spent the day killing pain with Percocets and marijuana. Tr. 1898,1900,1903-05. His girlfriend had earlier taken him out to make sure he ate

something and another witness described his condition as "high as a kite" and "wasted". Tr. 491. Investigators Mason and Burke led police into McCowen's Hyannis home at 7:05 PM, found him in bed watching cartoons, arrested him, and transported him to the State Police barracks. Tr. 1576. Marijuana, burnt out roaches and Percocets were found on his bedside table. Tr. 2590-91.

Given Miranda warnings, McCowen waived his right to an attorney "at this time." Tr. 1579-81. Mason claimed he sought McCowen's consent to record the interview and McCowen asked if he'd "look like an asshole" if he refused. Tr. 1582,1584. Mason alleged he replied "courts prefer that the interview be recorded to ensure accuracy" but McCowen didn't want to be recorded. Id. He signed a form withholding consent. Id. Mason told McCowen he "had a right to immediate medical attention, should he require it; and that he had a right to a phone call…" Tr. 1586. Charged with first-degree murder, McCowen purportedly told Mason "that he wanted to answer [his] questions and straighten everything out" to get him home as soon as possible. Id.

Throughout six hours of interrogation without food, drink, rest and with limited mental capacity, McCowen denied killing Worthington. At 12:09 AM on April 15, 2005, "Mr. McCowen indicated to [Trooper Mason] that he

watched CSI. He watched NYPD Blue. And he knew that 'shitheads' that do these things always call for a lawyer. He pointed out to me that he had not done so, that he was cooperating. And he wanted to assure me that he had not committed this murder." Tr. 1789. McCowen did feel "he should let his lawyer know that he is going to be in the Orleans District Court in the morning." Tr. 1790. McCowen tried to reach Attorney Nicholas Grefe, using a phone number supplied by police, but failed. Tr. 1791. Mason said McCowen offered to continue answering questions rather than go to a cold cell, so the interrogation continued for another hour-and-a-half. Tr. 1792. Mason prepared a 27-page report, from his notes, eight days later. Other suspects were asked to review and sign their statements but McCowen was not. Tr. 573, 2012-13.

McCowen moved to suppress the purported statements as involuntary. Tr. 563-83. Despite two witnesses who testified McCowen was "wasted", a man with a 78 IQ besotted by prescription drugs, alcohol and marijuana, the hearing court found his statements voluntary beyond a reasonable doubt. App. 20-22. McCowen also moved to suppress the statements based on police failure to videotape in violation of *Commonwealth v. DiGiambattista*, 442 Mass. 423 (2004). Tr. 573. The court

rejected that argument. App. 20-22. McCowen also moved to suppress the DNA evidence coerced during a meeting with his probation officer. PTH. 556-57. The court also denied that challenge. App. 20-21.

Trial began on October 16, 2006. The trial court denied McCowen's motion for a change of venue, despite a Cape-wide media circus including a wanted poster from the D. A.'s office stamped "SOLVED". Tr. 26-34. The parties impaneled a jury of 16. One juror seated was Eric Gomes, a bar manager and person of color whose family hailed from Cape Verde. Tr. 329-37. Voir dire of Mr. Gomes included an exchange in which Gomes said the allegations in the case that a black man had raped and killed a white woman would not affect his ability to be fair and impartial. Tr. 333,336.

Jurors also heard from Assistant Medical Examiner Henry Neilds, who did not perform Worthington's autopsy. Tr. 1213. He said the physician who performed the autopsy, James Weiner, was "unavailable due to illness." Id. Neilds testified to the findings and conclusions in the autopsy report, notes and charts Weiner prepared. Tr. 1216-38. He testified to the position of the body, to blood streaked across the chest and abdomen, to full rigor mortis, to green grass entwined in the scalp hair, to the lack of vaginal trauma and to a one-inch stab

wound on the chest. Tr. 1216-17. He relayed Weiner's findings of trauma including abrasions, scalp hemorrhaging, breast and hand contusions and the chest wound. Tr. 1218-19. Finally, Neilds parroted Weiner's conclusion about time of death:

> Mr. Welsh: And with respect to reviewing Dr. Weiner's notes, did he have some estimate as to the approximate time of death, if you recall?
>
> Neilds: I don't recall exactly. I thought he said in his notes.
>
> . . .
>
> Mr. Welsh: Sir, I'm going to show you Dr. Weiner's report. And with respect to this note here, I would ask you if you could look at it and then look up . . .
>
> All right. Sir, with respect to Dr. Weiner's observations of the body at the scene, did he indicate a hard, fast time of death?
>
> Neilds: No.
>
> Mr. Welsh: All right. What did he say?
>
> Neilds: Well, in the abbreviations, he said an estimated postmortem time of 24 to 36 hours.

Tr. 1234-35.

The Commonwealth also called lab analyst Christine Lemire, who testified she personally analyzed DNA swabbed from Worthington's breasts and vagina. Tr. 2423-33. She further testified:

> Mr. Welsh: And did you or your laboratory run one or more standards from Christopher McCowen?
>
> Lemire: Yes, we did.
>
> Mr. Welsh: How many did you run on Christopher McCowen?

Lemire: We ran two. One standard was submitted in July of 2004; and one other standard was submitted in May of 2006.

. . .

Mr. Welsh: Do they generate the same profile?

Lemire: They did generate the same profile.

Tr. 2434.

During cross, Ms. Lemire conceded:

Mr. George: Well you actually do the testing, don't you?

Lemire: I did not do the specific testing on [McCowen's] sample.

Mr. George: Well, you testified on Friday that you – you reported a match to Trooper Mason on April 13, 2005, didn't you? … [Y]our signature is on the report, isn't it?

Lemire: It is my signature on the report.

Mr. George: Well, did you do the testing?

Lemire: I didn't do the testing on this sample. For exemplars or known standards, oftentimes we have a Co-DNA Unit that processes these types of samples. It's my case. So, they would submit that information to me to generate the report.

Mr. George: So, if I asked you, ma'am, were you present while the testing was done on this sample?

Lemire: I wasn't immediately looking at the analyst doing the testing, no.

. . .

Mr. George: [D]id you supervise?

Lemire: In the sense that I reviewed the data, yes.

Mr. George: Well, other than reviewing the paperwork, did you actually review the testing to make sure it was done properly? While it was occurring?

> Lemire: Yes, by looking at the worksheets and identifying that the correct itemization was done … yes.
>
> Mr. George: Could you tell the jury today who actually physically did the testing on McCowen's sample?
>
> . . .
>
> Lemire: A colleague named Stefana Geiger at the time. Now she is married. Stefana Petrina.

Tr. 2526-27.

Petrina never testified.

During Mason's testimony, over McCowen's objection, the trial court allowed testimony about five women who had restraining orders against McCowen. The court theorized that McCowen "opened the door" when he asked Mason why he arrested McCowen for the murder. Tr. 2022-26, 2082-83.

The Commonwealth called Jeremy Frazier to testify he *didn't kill Worthington* but never disclosed its dismissal of serious charges against him, specifically for assault and battery with a dangerous weapon, a knife, and threats to kill two British men in Wellfleet on July 2, 2003. Tr. 2123-26.

McCowen called several defense witnesses, including two experts, Dr. Eric Brown and Dr. Richard Ofshe. Ofshe testified about the science of false confessions. Tr. 3397-3429. The trial court allowed discussion of the abstract idea, but refused Ofshe's expert opinion on the

instant case. Tr. 3427-29. The trial court also restricted psychologist Eric Brown, excluding testimony about McCowen's prior sexual relationship with Worthington, despite the Commonwealth's questions on that subject during cross-examination. Tr. 3163-68, 3286-87,3323-24. Other defense witnesses rebutted the Commonwealth's case, among them Girard Smith who witnessed a black SUV driven by a white male careening from Worthington's driveway on the day she was discovered as well as Keith Amato, Dr. Richard Saferstein and Eric Kinton.

The trial court charged the jury on November 7, 2006. Tr. 3593-3663. Six days later, with McCowen's assent, the judge closed the courtroom to the public and relayed that during the weekend, the boyfriend of Juror Number 4, Rachel Huffman, a Caucasian Town of Falmouth employee, had been arrested over the weekend. Tr. 3701-03, 3710. The trial court subsequently questioned each juror about the Hicks incident. Tr. 3709. Juror O'Connell said she saw a picture of Huffman's boyfriend on the news, then contacted juror Eric Gomes and Foreman Dan Patenaude, who'd also seen the report. Tr. 3706-15. After questioning eleven jurors, the trial court addressed Huffman:

The Court: I gather from materials that I have read and from representations … made to me that there was an incident at your home over the weekend. Is that fair to say?

Huffman: Yes, sir.

The Court: And I'm not asking you to describe it or to assess it or to make any statement in that regard. But obviously I am quite concerned as to whether you can continue to serve as a juror in this case. Based on everything that's occurred over the weekend and this morning, can you fairly and impartially continue to serve as a deliberating juror in this case?

Huffman: I – I think I can. I feel that I can. I mean, it had nothing to do with this case.

The Court: Are you confident of that?

Huffman: Yes.

The Court: As a result of the events of the weekend, have you formed any prejudice or bias toward either the Commonwealth or toward individuals who are arrested or involved with the criminal law in any way?

Huffman: No.

The Court: Are you as fair and impartial and unbiased as you were when you were first seated…?

Huffman: Yes.

. . .

The Court: Juror Huffman, I am going to have you continue to serve us as a juror.

Huffman: Thank you.

Tr. 3740-41.

McCowen then renewed his motion to sequester. Tr. 3742-43. Later that day, the court received a note from the jury that they were deadlocked. Tr. 3755. At defense

counsel's request, the trial court gave the *Tuey-Rodriguez* charge, Tr. 3756-59, and belatedly granted McCowen's sequestration motion. Tr. 3767-69. The court allowed jurors, including Huffman, to "call home and arrange for belongings to be brought to the hotel…" Tr. 3773.

The next day, the Commonwealth produced two recorded calls Hicks made to Huffman's cell phone, just after sequestration, while jurors made such arrangements. The calls came from a secure line at the Barnstable House of Correction. Tr. 3787-88. In the calls, Huffman referred to CourtTV, legal fees and to police harassing her neighbors, but there was no discussion of the case or deliberations. Tr. 3793. The Commonwealth moved to remove her pursuant to *Commonwealth v. Garrey*, 436 Mass. 422 (2002) and *G.L. c. 234, §26B*. Over McCowen's strenuous objection, the trial court dismissed Huffman and replaced her with an alternate. Tr. 3798-3802, 3808. The court said it would "follow the protocols" set forth in *Commonwealth v. Connor*, 392 Mass. 838 (1984) and *Commonwealth v. Haywood*, 377 Mass. 755 (1979), but held no voir dire hearing before the discharge. Tr. 3812-13.

On November 16, 2006, the altered jury convicted McCowen of all charges. Tr. 3855-58. The trial court

immediately imposed the mandated sentence of life in prison without the possibility of parole for first-degree murder with concurrent life sentences on the two other convictions. Tr. 3874.

Within days of the verdicts, three jurors reported racial animus and other misconduct during deliberations. McCowen moved for a new trial, and the court granted a hearing. App. 100. Jurors Roshena Bohanna, Normand Audet and Huffman testified to racist remarks made by Jurors Marlo George, Carol Cahill and Eric Gomes. MNTR. 1/10/08, 15-89. Huffman and Audet quoted George assaying "You can only get bruises like that from a big, black guy." MNTR. 1/10/08, 47-8,69. All three jurors recalled George and Cahill expressing fear because the "big black man" had stared at them. MNTR. 1/10/08, 15-17,76-7. The three said Gomes told fellow jurors he did not like black people because they were prone to violence and boasted "he was Cape Verdian not black." MNTR. 1/10/08, 74-5. Huffman described sequestered jurors playing Catch Phrase, a game George used to mock African-American Bohanna by repeating "I'm a racist." MNTR. 1/10/08, 89. Bohanna had earlier accused George of sidestepping evidence because of racist sentiments. At a post-verdict hearing, Gomes' aunt Julia Miranda testified her nephew told her many times before trial that he disliked black

people, referring to African-Americans as "niggers." MNTR. 2/1/08, 11-13,20. She said that Gomes had expressed racist views for years and had serious problems with his own African-American heritage. MNTR. 2/1/08, 11-19.

Despite the mountain of testimony, the trial court denied McCowen's motion. App. 211. His subsequent motion for a new trial, based upon the Commonwealth's failure to disclose exculpatory evidence including but not limited to Jeremy Frazier's 2003 arrest, App. 251, was also denied. App. 550. McCowen filed timely Notices of Appeal. App. 52-54.

I. THE COURT'S ALLOWANCE OF A MEDICAL EXAMINER AND A DNA ANALYST WHO DID NOT PERFORM THE ORIGINAL EXAMINATIONS AND TESTING WAS ERROR.

Commonwealth pathologist Henry Neilds shouldn't have testified to factual data in an autopsy report written by pathologist James Weiner. Tr. 1238-40. Crime Lab Supervisor Christine Lemire also should not have testified to facts and conclusions in DNA test reports when she did not conduct those tests. Tr. 2527-30.

The Sixth Amendment to the U.S. Constitution and Article 12 of the Massachusetts Declaration of Rights guarantee the accused a right to confront all witnesses against him, a "bedrock procedural guarantee that applies to all federal and state prosecutions." *Crawford*

v. Washington, 541 U.S. 36, 42 (2004). The trial court violated that confrontation clause when it permitted Neilds to testify to facts contained in an autopsy report and other studies he didn't author, a decision that conflicts with the Supreme Court's directive in *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527 (2009) and this Court's own ruling in *Commonwealth v. Nardi*, 452 Mass. 379 (2008). Testimony against a defendant is "inadmissible unless the witness appears at trial, or if the witness is unavailable, the defendant had a prior opportunity for cross-examination." *Crawford*, 541 U.S. at 54. In *Nardi*, this Court applied *Crawford* to a substitute medical expert's testimony, holding:

> Medical examiners, as expert witnesses, may base their opinions on (1) facts personally observed, (2) evidence already in the record or which the parties represent will be admitted during the course of the proceedings, assumed to be true in questions put to the expert witness, and (3) facts or data not in evidence if the facts or data are independently admissible and are a permissible basis for an expert to consider in formulating an opinion.

Nardi, 452 Mass. at 388.

A medical examiner may rely on facts in another autopsy report when forming an opinion, but may not testify to those facts. In *Commonwealth v. Avila*, 454 Mass. 774, 782 (2009), this Court held a substitute medical examiner "is not permitted on direct examination to recite or otherwise testify about the underlying

factual findings of the unavailable medical examiner as contained in the autopsy report." Evidence rooted in testimonial hearsay violates the Confrontation Clause. *Melendez-Diaz*, 129 S. Ct. at 2531-32; *Crawford*, 541 U.S. at 50-53; *Nardi*, 452 Mass. at 391-92; *Commonwealth v. Gonsalves*, 445 Mass. 1, 3 (2005). An autopsy performed pursuant to *G.L. c. 38, §§ 4 and 7*, an official inquest into a death, is testimonial. *Nardi*, 452 Mass. at 393. The discretion afforded the examiner to find facts, make observations and draw conclusions renders it so. Id. at 393-94. The *Nardi* Court found the Commonwealth's expert testified to inadmissible hearsay when he "…testified in some detail regarding the autopsy examination performed by [another physician] and the findings he reported in the autopsy report. Specifically, [the expert] described [the absent physician's] external and internal examinations … findings with respect to the rigidity of [the] body (and the relevance of those findings to time of death); and the locations…[of] contusions…he concluded were consistent with facial trauma. Id.

Neilds here testified at length about factual findings in Weiner's report, he being the doctor at the scene. Tr. 1216, 1219-38. Admission of hearsay from that report and other "studies" offends the Confrontation Clause "unless the witness appears at trial or, if the

witness is unavailable, the defendant had a prior opportunity for cross-examination." *Melendez-Diaz*, 129 S. Ct. at 2531. The Commonwealth did not call Weiner or the author of any study he referenced. Nothing in the record indicates these witnesses were unavailable. McCowen had no opportunity to cross-examine.

It has been held that "[t]he Confrontation Clause imposes a burden on the prosecution to present its witnesses, not on the defendant to bring those adverse witnesses into court." *Melendez-Diaz*, 129 S. Ct. at 2540. A Confrontation Clause violation compels reversal, unless the error was harmless beyond a reasonable doubt. *Commonwealth v. Diaz*, 453 Mass. 266, 275 (2009) ("We are mindful that we should apply the principle of harmless error with restraint."); *Chapman v. California*, 386 U.S. 18, 24 (1967) (Error is harmless only if the reviewing court can "declare a belief that it was harmless beyond a reasonable doubt.")

The error here was anything but harmless. Evidence of guilt was underwhelming. The prosecution hinged on time of death and the defense identified other viable suspects. The prosecution was inextricably tied to Weiner's autopsy findings and was fraught with weaknesses, yet Weiner never took the stand. Without the absent witness' findings, the Commonwealth had no

time-of-death evidence and competing versions of that issue were crucial. Tr. 1236, 1244-49, 2936-38. The Commonwealth introduced Weiner's findings and conclusions through Neilds, who also claimed rape through the report even though no vaginal trauma existed. Tr.1269-74. This case stands in sharp contrast to those where time of death was not disputed. See, e.g., *Commonwealth v. Pena*, 455 Mass. 1, 15 (2009). It's also distinct from *Nardi* where the defendant's expert used the autopsy report. *Nardi*, 452 Mass. at 395. The absent doctor's factual findings were the sole evidence supporting the prosecution's theory and the constitutional error is grave.

Like the instant case, *People v. Dungo*, 98 Cal. Rptr.3d 702 (Cal. App. 3d Dist. 2009) involved a murder trial where a substitute medical examiner testified to facts contained in an autopsy report he didn't prepare. As in this case, the original examiner was fired from the medical examiner's office before trial, allegations of incompetence swirling around him. Id. at 708-12. Finding substitute testimony unconstitutional, the California Court of Appeals concluded the State's failure to call the original medical examiner further prejudiced the defendant. Id. at 714. Quoting *Melendez-Diaz*, the court held "the prosecution's failure to call

[the author] as a witness prevented the defense from exploring the possibility that he lacked proper training or had poor judgment or from testing his honesty, proficiency, and methodology. Id. The U. S. Supreme Court found the same constitutional deprivation when the Commonwealth failed to call original lab analysts. *Melendez-Diaz*, 129 S. Ct. at 2538. McCowen also had no opportunity to address Weiner's competence, judgment, proficiency, and methodology. The trial court allowed his substitute Neilds to testify to the contents of the report Weiner authored, thereby enabling the Commonwealth to eviscerate McCowen's right to confront the witnesses against him. Time of death hearsay statements from that report made the Commonwealth's case.

Hearsay evidence received from State Police Crime Lab analyst Christine LeMire was even more egregious. DNA test results fall squarely within the parameters of *Commonwealth v. Verde*, 444 Mass. 279 (2005), abrogated by *Melendez-Diaz*, 129 S. Ct. 2527 (2009). In *Verde*, this Court held that certificates of chemical analysis did not implicate the Confrontation Clause, because they're "…neither discretionary nor based on opinion; rather, they merely state the result of a well-recognized scientific test." *Verde*, 444 Mass. at 283. In *Melendez-*

Diaz, the U.S. Supreme Court overruled *Verde*, holding that certificates of analysis prepared in anticipation of trial are testimonial; their admission absent testimony from the certificate's author violates the Confrontation Clause. *Melendez-Diaz*, 129 S. Ct. at 2532-42.

In *Commonwealth v. Connolly*, 454 Mass. 808, 830 (2009), this Court noted:

> [T]he Supreme Court did not grant certiorari in Melendez-Diaz until … long after the defendant's trial. Although it is not free of doubt, the 'clairvoyance' exception may apply in these circumstances … Arguably, the defendant could not reasonably have been expected to assert at trial a constitutional proposition that we had so recently rejected; it would therefore follow that he could raise the issue now and have us apply the standard for constitutional error, i.e., whether the error was harmless beyond a reasonable doubt.

The same is true here. McCowen was tried during October/November, 2006, when *Verde* controlled. Like the *Connolly* defendant, McCowen now asks this Court to apply the harmless error standard. Unlike *Connolly*, the error here was grievous. The Commonwealth's case was built on DNA evidence. The alleged match between McCowen's DNA and that found on Worthington's body was the bedrock of the charges. It provided the only physical link between McCowen and the victim. Police relied upon the purported match to arrest McCowen and to induce statements later construed as admissions. Given DNA's central role, this

Court cannot conclude its admission through a substitute witness was harmless beyond a reasonable doubt.

Even under the higher substantial miscarriage of justice standard, the admission of this evidence could not withstand scrutiny. Even with the erroneously admitted evidence, the jury deliberated eight days, reporting a deadlock. Tr. 3755. Had it been properly excluded, stark absence of physical proof likely would have led to acquittal. Admission of an alleged DNA match through a witness who did not perform the analyses deprived McCowen of his right to confront the witnesses against him and likely altered the outcome of his trial. This Court must afford a new one.

II. THE COURT'S REMOVAL OF A DEADLOCKED DELIBERATING JUROR WAS REVERSIBLE ERROR.

A trial court should not discharge a deliberating juror absent unique, compelling circumstances. *Commonwealth v. Garrey*, 436 Mass. at 430-31. Even under such circumstances, the court must hold a hearing and examine all involved as to whether good cause exists for discharge. *Commonwealth v. Haywood*, 377 Mass. at 769-70.

Here the trial court discharged Juror Rachel Huffman, without a hearing, after a deadlock. Tr. 3755. A Caucasian woman from Falmouth, Huffman had served four weeks, including six days of deliberation. On November

13, 2006, the trial court conferred with the parties in a closed courtroom, announcing that Falmouth Police had arrested Kyle Hicks at Huffman's home for an unrelated crime. Hicks, an African-American, was the father of Huffman's child. Tr. 3703.

The trial court questioned the eleven other deliberating jurors about the weekend's events. Four admitted seeing the arrest on TV news, then phoning each other to discuss it, in violation of the trial court's orders. The court returned all four to deliberations. Tr. 3711-12, 3715. The court then examined Huffman, who said she did not discus deliberations with fellow jurors or with Hicks, and that she had been at home when police arrived. Tr. 3703. She said she could continue to serve as an impartial juror and the court accepted that assertion. Tr. 3740-41. The court watched the tape of her police interview in which she implied her relationship with Hicks was strained and that the police were wise to tape record her statement, an issue in the trial. The trial court found Huffman had done nothing wrong and returned her to the panel. No one objected. Tr. 3740-41, 3751.

Later that day, jurors reported a deadlock. Tr. 3755. The Court subsequently sequestered the jury, allowing them to make necessary arrangements via

personal cell phones. While doing so in the presence of court officers and fellow jurors, Huffman took a call from Hicks, who'd just arrived in the Barnstable County Jail after being arraigned in Falmouth District Court. How he managed to place that call is a matter of considerable speculation since jail protocol precludes such calls. Jail authorities recorded it, rushed the tape to State Police and the transcribed tape was an exhibit the next morning. Tr. 3789.

Huffman spoke of neither deliberations nor her feelings about the case. Tr. 3795-97. Nonetheless, over defense counsel's objection, the trial judge summarily discharged her without a hearing after a night of sequestration. Tr. 3803. No one contended she did anything wrong and during five weeks of jury service she was never identified as a problem juror. Tr. 3795-97. The court replaced her with an alternate, creating the panel that convicted McCowen. The defendant's mistrial motion was denied. Tr. 3826-29.

The trial court's action mandates reversal. Huffman's discharge, a few hours after deadlock, was based on curious grounds; one, she violated the court's order to avoid media coverage; and two, she'd not been truthful about her relationship with Hicks. Tr. 3802, App. 7. Her discharge, with no record facts to show the

necessary "good cause," was reversible error. *G.L. c. 234, §26B; Commonwealth v. Connor*, supra.

In *Connor*, a deadlocked jury reported a lone holdout would not further deliberate. Like this trial court, the *Connor* court examined each member of the panel and ordered the juror returned to deliberations. Soon thereafter, the court received word the juror remained uncooperative and removed him without further hearing. This Court held that action constituted reversible error. The initial hearing here, ostensibly based on Hicks's arrest but actually spawned by the court's discovery that Huffman shared a child with the likes of him, led to the same reversible error. The trial court ignored McCowen's objections and this Court's warning that "[t]he discharge of a deliberating juror is a sensitive undertaking and is fraught with potential for error. It is to be done only in special circumstances, and with special precautions. Great care must be taken to ensure that a lone dissenting juror is not permitted to evade his responsibilities." *Connor*, 392 Mass. at 843, citing *United States v. Lamb*, 529 F.2d 1153, 1156 (9th Cir. 1975)

This Court concluded the trial court "must hold a hearing adequate to determine whether there is good cause to discharge a juror." *Connor*, 392 Mass. at 843-44

citing *Haywood*, 377 Mass. at 769-70. The court here ran afoul of this Court's admonition. Despite paying lip service to the "protocols" required by *Connor* and *Haywood*, the trial court failed to follow the most basic among them:

> We think it instructive to add that, in the future, before a juror is excused from deliberations and replaced by an alternate … the judge should hold a hearing and be fully satisfied that there is a meritorious reason why a particular juror should not continue to serve … [T]he juror's presence may or may not be required, but all other personnel with relevant information should be heard … before the juror is … discharged. The judge then should consider whether, in view of all the circumstances, an alternate juror should be substituted.

Haywood, 377 Mass. at 769-70.

None of that happened here. Questions remain about the mysterious, overnight-delivery tape; about whether Huffman watched the news; whether her view of law enforcement changed because of the Hicks conversation. The court drew its conclusions from the tape alone, extrapolating from an off-hand remark about Falmouth Police to conclude Huffman harbored antipathy toward the Commonwealth. *Connor* and *Haywood* require more.

This case is more egregious than *Connor* or *Haywood* because Huffman was not a "problem juror," in no way antagonistic toward the process. During deliberations, she acted as a mediator, urging fellow jurors to listen to the dissidents. But even if she'd been detested, her

perfunctory dismissal was error. "Although a mistrial may be expensive in both human and monetary costs," a trial court cannot trample on a criminal defendant's rights simply to avoid those costs. *Connor*, 392 Mass. at 844.

The jury was deadlocked when the trial court subtracted Huffman from the equation and a mistrial hung in the balance. A month-long, high-profile investment was in jeopardy and the court thought Huffman was the cause. Post-trial hearings revealed the true situation; Huffman was a critical participant in deliberations, ensuring all jurors were heard. A trial court has at most limited discretion to determine a juror is unable to perform; that inability must appear in the record as a demonstrable reality. *People v. Compton*, 490 P.2d 537 (1976). Huffman took a call from her child's father, with critical daycare issues looming, after sudden sequestration. She neither said nor did anything to warrant removal. If she had, it wouldn't matter: a *hearing is required.* The trial court's failure to hold one constitutes reversible error. From the recorded call, the court jumped to unwarranted conclusions: Huffman lied about her relationship with her child's father, watched the news, and harbored negative feelings toward law enforcement. Tr. 3798-3802.

If a deliberating juror "dies, or becomes ill, or is unable to perform his duty for any other good cause – the court may order him to be discharged" *G.L. c. 234, §26B*. A hearing must be held to determine whether good cause exists. *Haywood*, supra. Neither the case nor jurors' interactions should be discussed. See *Commonwealth v. Webster*, 391 Mass. 271, 275-76 (1984). If the "problem" juror is questioned, the judge should explain he cannot be discharged unless he has a personal problem unrelated to the case and fellow jurors. Unless the juror indicates such a problem, all questioning should cease. *Haywood*, 377 Mass. at 770, n. 15. None of that happened here. After the November 13, 2006 hearing, Huffman returned to deliberations. Tr. 3740-41. No findings exist to establish the "good cause" necessary to remove her the next day. She did nothing more sinister than accept a call from her child's father, in full view of court officers and other jurors.

Had a hearing been held, Huffman could not have been legitimately removed. The *Connor* problem juror said he was unable to honor his oath, but did not establish statutorily required "good cause." The Court found such representations, made by the trial court and other jurors, may have been euphemisms for the truth, that the juror persisted in asserting a minority position. Here,

the trial judge's reasons for refusing further inquiry are immaterial. A hearing was required.

In an appropriate case, after an appropriate hearing, and on the basis of appropriate findings, a judge may conclude a juror has a mental or emotional aberration, personal to the juror, that rises to the level of good cause for discharge. Here, no one suggested Huffman suffered from emotional or psychological illness. Not only were there no findings; there were no allegations. The trial court simply bounced a juror thought to be holding up the verdict.

The trial court's reliance on *Commonwealth v. Tennison*, 440 Mass. 553 (2003), Tr. 3806, was also misplaced:

> In Commonwealth v. Jackson, 376 Mass. 790, 800 (1978), this court set forth procedures for courts to follow when a claim of extraneous influence … is brought to the attention of a trial judge. The judge should first determine whether the material … raises a serious question of possible prejudice. If … so … he … should conduct a voir dire examination of the jurors. This initial voir dire may be conducted collectively, but if, in fact, a juror indicates exposure to the extraneous material in question, an individual voir dire is required to determine the extent of that exposure and its prejudicial effect.

Id. at 557-58 citing *Commonwealth v. Koumaris*, 440 Mass. 405, 412 (2003); *Commonwealth v. Francis*, 432 Mass. 353, 369-70 (2000); *Jackson*, 376 Mass. at 800.

Here, no removal hearing was held. The day before, Huffman passed muster and returned to deliberations. But

the court was stewing, particularly after the deadlock. The trial court could have removed four other jurors, for watching TV news and discussing the case over the weekend in violation of orders, but did not. Tr. 3706, 3711-12, 3715, 3727, Trial was in its fifth week, days into deliberations. Had the court bounced four jurors, the case would have imploded. Huffman remained a qualified, conscientious juror, serving in the trial of a black man charged with rape/murder of a white woman with whom he claimed a prior sexual relationship. The court changed its mind about Huffman only after listening to the mysteriously recorded telephone call between a black man and a white woman who share a child, a call allowed by his court officers and the Barnstable County Jail. Tr. 3798-3802. Huffman's removal unnecessarily upset the jury's balance, causing a "substantial risk of a miscarriage of justice." *Tennison*, supra at 559. It is also true that:

> [W]e also cannot permit valid legal procedures to be frustrated by accusations, which are easily made and may well be false … Such conflicts cannot be resolved with precision … [W]e defer to the appraisal by the trial judge who is in the best position to observe and assess the demeanor of the jurors on voir dire.

Commonwealth v. Francis, 432 Mass. at 369-70. Determining whether a juror is affected by extraneous information is within the sound discretion of the trial

judge. *Kamara*, 422 Mass. at 620; *Tennison*, supra at 559-60. The court found Huffman qualified during the only hearing conducted. Tr. 3741.

The trial court's reliance on *Garrey* was also misguided. Tr. 3798. There, the Commonwealth moved to discharge a deliberating juror whose son and husband had been arrested, the son confined in the same house of correction as the defendant. The juror, unaware the defendant was incarcerated, said she could remain impartial. The trial judge opined that she could, but nevertheless discharged her because of the prosecutor's concern. The defendant objected, arguing that concern could be addressed by relocating the defendant. *Garrey*, 436 Mass. at 430-31.

The *Garrey* trial court held a hearing; this court did not. But Huffman's impartiality was not the issue. The court said she'd been dishonest about her relationship with her child's father, Tr. 3800, though nothing in the record supports that conclusion. The prosecutor, whose nomination for judgeship during trial was a Cape Cod Times front-page story, moved to remove Huffman, noting she'd referred to CourtTV during the conversation. Tr. 3790. Linked by a need to secure a verdict, the court and prosecutor tortured this reference to infer she alone watched TV news in

violation of the court's order. When four other jurors admitted watching TV news and calling each other at home to discuss the case, the court found no fault. Tr. 3705-41. None of the four was thought to be holding up the verdict.

The reasons offered for Huffman's discharge were woefully insufficient. Unlike the *Garrey* defendant, McCowen's rights "under art. 12 of the Massachusetts Declaration of Rights were jeopardized … and … he was otherwise prejudiced by the juror's discharge." G.L. c. 234A, §74. No "truly unique and compelling circumstances arose that warranted the juror's discharge." *Garrey*, Id. These convictions must be reversed.

III. THE COURT COMMITTED REVERSIBLE ERROR WHEN IT FOUND McCOWEN'S UNRECORDED STATEMENT VOLUNTARY.

The trial court erred finding McCowen's April 14, 2005 statements voluntary beyond a reasonable doubt. App. 20. A statement is "voluntary if it is the product of a rational intellect and a free will and not induced by physical or psychological coercion." *Commonwealth v. LeBlanc*, 443 Mass. 549, 554 (2001); *Mincey v. Arizona*, 437 U.S. 385, 398 (1978). This Court has said:

> Voluntariness turns on the totality of the circumstances including promises or other inducements, conduct of the defendant, the defendant's age, education, intelligence and emotional stability, experience with and in the criminal justice system, physical and mental condition, the initiator of the discussion of a deal or lenience

(whether the defendant or the police), and the details of the interrogation, including … Miranda warnings.

Commonwealth v. Mandile, 397 Mass. 410, 413 (1986). The Commonwealth bears the heavy burden of proving a statement voluntary beyond a reasonable doubt, a burden even more daunting when police fail to record the interrogation:

[A] judge may reasonably conclude that when the party with the burden of proof beyond a reasonable doubt on the issues of voluntariness and waiver deliberately fails to utilize readily available means to preserve the best evidence of what transpired … it has not met that very high standard of proof.

Commonwealth v. DiGiambattista, 442 Mass. 423, 441 (2004). The Court noted eight years had passed since it announced "[f]ailure to record … would not result in automatic suppression … [but] the lack of a recording was … relevant … on the issues of voluntariness and waiver." Id. citing *Commonwealth v. Diaz*, 422 Mass. 269, 273 (1996).

The *DiGiambattista* Court invited the parties and amici to brief "the issue of requiring electronic recording of interrogations," Id. at 440, noted two states did, but declined to follow suit at that time:

Despite our view that recording … would improve the efficiency, accuracy, and fairness of criminal proceedings, we still decline at this time to make recording … a prerequisite to … admissibility … However, where … recording is left to the unfettered discretion of law enforcement (as it is at present), and an officer has chosen not to record … we think that it is only fair

to point out to the jury that the party with the burden of proof has … decided not to preserve evidence of that interrogation in a more reliable form, and … they may consider that fact as part of their assessment of the less reliable form of evidence that the Commonwealth has opted to present.

Id. at 449. Nearly fifteen years after *Diaz* and six years after *DiGiambattista*, McCowen respectfully suggests the time has come: the fruits of an unrecorded interrogation should be inadmissible at trial.

Alaska was first to require electronic recording in felony cases. *Stephan v. State*, 711 P.2d 1156 (1985). Since then, six states and the District of Columbia have required police to record interrogations in at least some criminal cases. Most allow police to record surreptitiously. Where permission is required, most suspects consent. If the interrogation is lawful, no valid challenge to admissibility exists and a major cause of wrongful convictions is eradicated. The Alaska Supreme Court noted: "[a] recording … will aid law enforcement…by confirming the content and the voluntariness of a confession, when a defendant changes his testimony or claims falsely that his constitutional rights were violated." *Stephan*, supra at 1161. An objective recording makes it unnecessary to rely on selective, potentially biased accounts of what occurred. It opens police practices to scrutiny and renders

interrogators less likely to use coercive techniques, the primary cause of false confessions per Dr. Ofshe. Tr. 3330-3464.

This sensational case is the exclusionary rule's poster child. Authors and journalists ridiculed law enforcement and cast aspersions on the D.A.'s bizarre behavior. Police came upon an unintelligent suspect burdened by drugs and alcohol. Tr. 1812, 1902-04, 2588-2590, 2592, 3186. Questions abound about McCowen's physical and mental states, his comprehension and sobriety. His 78 verbal IQ verges on retardation, Tr. 3250-51, yet police described a cognizant, conversant individual interrogated for six-plus hours without food or rest. They claim they offered pizza and bathroom breaks, yet failed to record it. Police had to admit McCowen called Attorney Grefe; the message was on his answering machine. PTH. 468, Tr. 1790. They contend McCowen re-initiated interrogation after that attempt, continuing for more than an hour, but a tape would confirm that claim or violated his most fundamental rights. See *Commonwealth v. Vao Sok*, 435 Mass. 743, 751 (2000). A tape would reveal what happened when McCowen invoked his right to counsel, whether questioning ceased. *Miranda v. Arizona*, 384 U.S. 436, 444 (1966).

A recording would allow the court and jury to assess McCowen's competence and comprehension. It would show whether the interview was relaxed and conversational as police claimed, or whether they coerced him with the unsavory tactics denounced by this Court in *DiGiambattista*, 442 Mass. at 434-39. Failure to record is a particular problem here, where police claim McCowen was averse to taping. Tr. 1582-84.

The current state of the law poses an inherent danger. Police know this Court prefers, but doesn't require, taping, a non-rule that provides incentive to suggest a suspect need not participate in taped interrogation. If non-taped statements were inadmissible, interrogation tactics would be forced from the shadows. Taping is essential in a first-degree murder case, where the stakes are enormous. Police have incentive to obtain a statement by any means; the suspect needs heightened protection. If this Court doesn't adopt an across-the-board rule, it should do so for homicides. Here, police knew of the trash collector's limited intelligence from prior interviews and from his informant activities. They knew he'd ingested Percocet and marijuana that day. Tr. 1902-04. They exploited his impairments to obtain a statement they sorely needed. It was a perfect storm: mental

poverty, inebriation, and a high-profile murder unsolved for forty months. Potential for manipulation ran high.

Police have known a suppression rule was possible, if not inevitable, since *Díaz*. Even under current law, this interrogation doesn't pass muster. The trial court found McCowen's statements voluntary because he didn't confess, a faulty analysis. Early jurisprudence on the Humane Practices Rule focused on the confession/admission distinction, excluding involuntary confessions, but not involuntary non-confessional statements. *Commonwealth v. Marshall*, 338 Mass. 460, 464 (1959); *Commonwealth v. Haywood*, 247 Mass. 16, 18 (1923). The U.S. Supreme Court eradicated that distinction; admission of any involuntary statement offends due process. *Mincey*, 437 U.S. at 398. This Court also focuses on statements, not confessions, when analyzing voluntariness. See *Commonwealth v. Anderson*, 445 Mass. 195, 205-06 (2005).

Under *Mincey*, McCowen's refusal to confess is irrelevant. He tried to contact his attorney, was marginally retarded, handicapped by narcotics and alcohol, and interrogated for six-plus hours with no recording. His statements were not voluntary beyond a reasonable doubt. The trial court erred, failing to factor the absence of a recording into its analysis.

This Court should mandate recording and reverse McCowen's convictions.

IV. DEFENDANT'S MOTION FOR NEW TRIAL BASED UPON JUROR MISCONDUCT SHOULD HAVE BEEN ALLOWED.

The defendant moved for post-verdict inquiry based on affidavits from three jurors, Roshena Bohanna, Rachel Huffman, Normand Audet, and non-juror Julia Miranda.[2] Defendant moved for a new trial pursuant to *Commonwealth v. Fidler*, 377 Mass. 192 (1979) and *Commonwealth v. Laguer*, 410 Mass. 89 (1991). App. 100. The trial court took testimony on January 10, 11, 18 and February 1, 2008. The court wrongly denied the motion on April 4, 2008. App. 211.

Juror affiants separately contacted defense counsel immediately after the verdict. Generally consistent, the affidavits identified ethnically prejudiced jurors; quoted racial slurs made during deliberations; cited ignorance of the court's instructions and applicable law; described inappropriate chats about deliberations with alternates before and after an alternate was seated; and evinced misunderstanding of *Tuey-Rodriguez*. App. 118-127. The three affidavits detailed specific events, some racially charged and difficult to rebut. This case hinged on racial and class bias, described by

[2] This argument has been fully made in the briefings included in the Appendix. App.100,131.

counsel in opening, questioning, and closing. Tr. 578, 1873, 3530. Each seated juror denied racial prejudice during voir dire. It's now clear some were less than forthright, consciously or not.

The affidavits and in-court testimony establish rampant racial prejudice in these jury deliberations, "particularly egregious" misconduct. *United States v. Henley*, 238 F.3d 1111,1121 (9th Cir. 2001) (error to reject black defendant's offer to prove juror used the word "nigger"); *Tobias v. Smith*, 468 F. Supp. 1287 (W.D.N.Y. 1979) (habeas corpus granted where juror said "you can't tell one black from another"); *State v. Johnson*, 2001 WL 694730 (S.D. June 20, 2001) (jurors' comments "I have a rope" and "I have a tree" during black defendant's trial constituted misconduct); *United States v. Heller*, 785 F.2d 1524, 1526-28 (11th Cir. 1986) (conviction reversed where juror said "the fellow we are trying is a Jew, I say, let's hang him"). See generally *Developments in the Law — Race and the Criminal Process: VII: Racist Juror Misconduct During Deliberation.* (1988) 101 Harv. L. Rev. 1595.

The Sixth Amendment guarantees a verdict rendered by impartial jurors. Even one racially prejudiced juror would violate McCowen's right to a fair trial. *United States v. Hendrix*, 549 F.2d 1225, 1227 (9th Cir. 1977).

Post-trial hearings proved racial prejudice affected at least half the panel. "If a criminal defendant could show that the jury was racially prejudiced, such evidence could not be ignored without trampling the sixth amendment's guarantee to a fair trial and an impartial jury." *Wright v. United States*, 559 F. Supp. 1139, 1151 (E.D.N.Y. 1983). Defendant need not prove "prejudice pervaded the jury room … bias or prejudice of even a single juror" violates the Sixth Amendment. *Dyer v. Calderon*, 151 F. 3rd 970, 973-4 (9th Cir. 1998).

A deliberating juror exposed to "extraneous matter" mandates a new trial unless the Commonwealth proves absence of prejudice beyond a reasonable doubt. The definition and test for "extraneous matter" remain unchanged. *Commonwealth v. Hunt*, 392 Mass. 28, 41 (1984); *Commonwealth v. Casey*, 442 Mass. 1, 5 (2004). This Court cannot ignore defendant's fundamental right to a verdict rendered by twelve indifferent, impartial jurors. *Irvin v. Dowd*, 366 U.S. 717, 722 (1961); *Commonwealth v. Tavares*, 385 Mass. 140,152 (1982).

This jury's behavior could not have been anticipated. Three jurors revealed the wrongdoing after the verdict. Miranda came forward after she saw news coverage of laughing deliberating jurors posed in the jury room, jurors' (minus Huffman, Bohanna and Audet)

post-verdict dinner with the prosecutor at Wimpy's, and her first-hand observation of Gomes' post-trial testimony. App. 58, MNTR. 2/1/08, 21-24. Record evidence amassed at post-trial hearings proved this jury did not take its job seriously. It matters not whether a single juror, or the entire panel, was exposed to racial bias; a criminal defendant is "entitled to be tried by twelve, not nine or even ten, impartial and unprejudiced jurors." *Parker v. Gladden*, 385 U.S. 363, 366 (1966). McCowen deserves a new trial. It is clear that "[t]he judge who examines on the voir dire is engaged in the process of organizing the court. If the answers to the questions are willfully evasive or knowingly untrue, the talesman…is a juror in name only." *Clark v. United States*, 289 U.S. 1, 11 (1933). McCowen proved by a preponderance of the evidence that Gomes' presence on the panel was a sham. The Commonwealth offered no rebuttal.

The magnitude of these transgressions is enormous. Flagrant misconduct makes this a rare case; this Court must presume juror bias. See *Burton v. Johnson*, 948 F.2d 1150 (10th Cir. 1991). A defendant who shows a juror "failed to answer honestly a material question on voir dire, and then further shows that a correct response would have provided a valid basis for a challenge for

cause," is entitled to a new trial. *McDonough Power Equipment, Inc. v. Greenwood*, 464 U.S. 548, 555-56 (1984). The prosecution argued jurors who use the word "nigger" or other racial slurs aren't necessarily racially biased. MNTR. 2/1/08, 67-83, but it's not the law:

> [W]e have considerable difficulty accepting the government's assumption that, at this time in our history, people who use the word 'nigger' are not racially biased … [B]ecause the bias of a juror will rarely be admitted by the juror himself … it … must be inferred from surrounding facts and circumstances.

Id. at 558. Jurors George, Cahill and Gomes bared their biases, consciously or not, in the jury room. Racial animus communicated by a juror, not a third party, is still an improper extraneous influence. If even one affidavit like the four offered here is found true "in so far as it describes ethnically oriented statements attributed to jurors," the defendant is entitled to a new trial. *Laguer*, supra at 99.

The *Laguer* Court pinpointed the applicable standard:

> [T]he only question … [is] whether the … disclosures in … affidavit[s] of ethnically oriented statements … made by one or more jurors are essentially true. We recognize that the ultimate concern is whether any juror in fact harbored ethnic bias against the defendant. We also recognize the possibility (though not a probability) that [the attributed] statements … as tasteless as they were, were only jocular in nature and did not reveal a true prejudice. However, we think that, if the judge were to

find … [an] affidavit essentially true, to the extent it purports to repeat ethnically oriented statements of jurors, it would be unrealistic to expect the judge to resolve with confidence a further question as to whether a juror or jurors charged … with having made those statements were or were not … ethnically biased … we think that a determination … concerning … actual ethnic prejudice among the jurors cannot confidently be made … [T]he 'difficulty' translates into an 'impossibility' when the bias in question is ethnic or racial in nature … If the affidavit … is found to be essentially true in that regard, the defendant shall be entitled to a new trial.

Id. at 98-99.

The *Laguer* affiants didn't support his claims. In this case, these four affiants detailed racially derogatory statements/actions by three deliberating jurors, broader wrongdoing than that in other racial bias cases. In *Tavares*, supra, a non-deliberating juror's bias allegations didn't hold up under scrutiny. In-court testimony confirmed and supplemented the affidavits, the court's inquiry broader than defense counsel's. *Fidler*, supra. Denying "…that race or racism exists is possible only for whites whose majority status allows them to assume that they do not have a race." *Justice Denied: Racial Bias in Jury Behavior*, Keene, D.L., Ph.D. & Handrich, R.R., Ph.D. (2002).

This Court must consider how quickly the affiants came forward, within a few days. They came singly, from distinct backgrounds, unknown to each other before trial, yet so haunted by what occurred in that jury room

they had to speak. It's not necessary to ask why racial slurs were uttered, or what impact they had on other jurors. Hearings proved the statements were made. Miranda further underscored two instances of juror misconduct, corroborating the affiant jurors and proving Gomes lied during voir dire and post-trial hearing. His dishonesty prejudiced McCowen. *Amirault*, 399 Mass. 617, 625 (1987); *Fidler*, supra; *Commonwealth v. Kincaid*, 444 Mass. 381 (2005). In fact, Gomes' prejudices were bared even before Miranda came forward.

McCowen proved by a preponderance of the evidence that racially biased statements were made and then the burden shifted to the Commonwealth, which presented no evidence. The statements' impact on jurors and the verdict need not be shown because prejudice is presumed. *Laguer*, supra at 99. Yet the Commonwealth presented nothing, falling far short of proving McCowen suffered no prejudice beyond a reasonable doubt. See *Fidler*, supra at 201; *United States v. Howard*, 506 F.2d 865, 869 (5th Cir. 1975); *United States v. Blair*, 444 F. Supp. 1273, 1275 (D.D.C. 1978). All doubts must be resolved in favor of the defendant. *Commonwealth v. Vardinski*, 438 Mass. 444, 452-53 (2003).

The trial judge's rejection of McCowen's motion was stunning. He summarily dismissed Huffman's testimony:

she "misled the court," was cast in "a bad light in her community", had "a motive to wreak havoc on the judicial process." She'd been "meddlesome," causing Bohanna to mistrust others. The charades incident had no import; neither Audet nor Bohanna could verify it. Racist taunting never occurred, though jurors testified they'd played the game. "This jurist does not find her credible." App. 217-18.

The judge acknowledged Audet's affidavit tracked Bohanna's, but said his testimony, "while sincere" was faulty. Audet was uncertain whether Cahill or George feared McCowen; he was fuzzy about chronology, about dates as if dates would alter content. App. 220. By nullifying Huffman and Audet, the judge placed the racism charges squarely on Bohanna, then dismissed large portions of her testimony by saying "[t]he court accepts Juror Bohanna's ire as a warning flag that careful scrutiny must be given to Juror George's words … Juror Bohanna was appropriately vigilant in keeping racial bias from infecting the deliberations. Her calling was honorable." App. 224. Yet Bohanna's testimony failed, perhaps because the affidavits of all "complaining affiants," had been "filtered through defense counsel's draftsmanship." App. 219.

The trial court called Miranda "a pleasant woman known to this jurist from her frequenting the local courts … often enough that she leaves baked goods for the security staff." But her decision to approach an *author, not a court officer, proved she was "seeking her* 15 minutes of fame." Without warrant, the court noted two of her sons had priors, making it likely the 74-year-old harbored "resentment towards law enforcement." App. 227-229.

Factually and legally flawed, the trial court's decision ignores that three deliberating jurors swore to grave misconduct on the part of three other deliberating jurors, involving half of McCowen's jury. This Court must order a new trial.

V. *THE MOTION FOR NEW TRIAL BASED ON WITHHOLDING OF EXCULPATORY EVIDENCE SHOULD HAVE BEEN ALLOWED.*

McCowen moved for a new trial pursuant to Mass. R. Crim. P. 30(b). The prosecution withheld requested, material exculpatory evidence including Commonwealth witnesses' criminal records and the State Crime Lab's gross deficiencies. App. 251,527.[3] The trial court's denial of the motion, without hearing, was reversible error. App. 550. McCowen had moved for discovery of all intra- and inter-departmental records and reports;

[3] This matter has also been fully briefed in the submissions contained in the Appendix. App. 527.

juvenile, probation, arrest and criminal records of all Commonwealth witnesses; all information pertinent to scientific tests; for other suspects; and for discovery regarding alleged witnesses. App. 13, 578, 583. After discovery conferences on February 10, April 7, and October 11, 2006, the Commonwealth filed a Discovery Compliance Certificate, knowingly withholding specifically requested evidence. App. 23.

McCowen was not obligated to independently unearth material he requested. The State must disclose all data it possesses and all information possessed by persons "subject to the prosecutor's control." *Commonwealth v. Martin*, 427 Mass. 816, 824 (1998) (Prosecutor must disclose "information in possession of a person who has participated in the investigation or evaluation…and has reported to the prosecutor's office…"); *Commonwealth v. Tucceri*, 412 Mass. 401, 412 (1992); *Commonwealth v. Neal*, 392 Mass. 1, 8 (1984). A defendant must be granted a new trial when the Commonwealth doesn't disclose evidence favorable to the accused that may have altered the verdict. *Brady v. Maryland*, 373 U.S. 83, 87-8 (1963). Forty-five years ago, the United States Supreme Court defined the standard the government must follow with regard to disclosure of exculpatory evidence. *Id.* The *Brady* Court concluded that the goal of the criminal

justice system was the fair and balanced prosecution of the accused.

Accordingly, "suppression of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or punishment, irrespective of the good faith or bad faith of the prosecution." *Brady*, 373 U.S. at 87. Even in the absence of a discovery request by the defendant, the prosecution must disclose any and all obviously materially exculpatory information in its possession. *United States v. Agurs*, 427 U.S. 97, 108 (1976). Evidence is materially exculpatory if there is a reasonable probability that its disclosure to the defendant would have resulted in a different outcome. *United States v. Bagley*, 473 U.S. 667, 682 (1985).

Massachusetts courts have adopted a broader definition of the disclosure obligations than those inherent in the *Brady/Bagley* standard. In Massachusetts, these obligations extend to "all evidence which tends to negate the guilt of the accused or, stated affirmatively, supporting the innocence of the defendant." *Commonwealth v. Healey*, 438 Mass. 672, 679 (2003). A finding of a *Brady* violation is akin to finding "an appearance that justice may not have been done", Mass. R. Crim. P. 30, thus, warranting a new

trial. Despite repeated requests, the prosecution failed to disclose critical evidence about key government witnesses, including Jeremy Frazier, and about neglect and incompetence at the Crime Lab, occurring precisely when this case was forensically processed. For either or both reasons, McCowen is entitled to a new trial.

An unsettling pattern of investigators, arresting officers, witnesses, and prosecutors threads through the withheld evidence. The undisclosed data had to be deliberately buried; it was in the prosecutor's own files. Frazier was a principal prosecution witness, but evidence of his 2003 arrest for assault and battery with a dangerous weapon, a knife, threatening to kill two British tourists, was buried. Wellfleet Detective Michael Mazzone, a prosecution witness listed but not called, made the arrest and was Informant-McCowen's handler. Wellfleet officer Lloyd Oja also investigated Frazier's attacks, but didn't mention them when called by the Commonwealth to address McCowen's cooperation with law enforcement. Tr. 2414.

Disconcerting commonalities like these permeate the wrongly hidden evidence. The office that prosecuted McCowen issued the charges against Frazier. It never revealed the eerily similar details of that crime to the Worthington murder, the violent threats Frazier made,

the identity of his cohorts, or even the very existence of the case that lingered in local courts for a year while investigators struggled to solve this one. Cross-examination of Frazier and other witnesses would have tied directly to this evidence. Tr. 2124-7,2240. A specific instance of conduct substantially similar to the murder itself has direct relevance to the identity of the true attacker. *Commonwealth v. Pring-Wilson,* 448 Mass. 718, 737 (2007).

This evidence was critical to McCowen's claims that Frazier alone killed Worthington and that his relationship with law enforcement shielded him from the charge. When defense counsel tried to undermine Frazier's credibility, expose his favored status with police, the Commonwealth objected, then watched the perjury as Frazier denied, denied and again denied ever having law enforcement issues. Tr. 2123-2128. McCowen maintained Frazier was the murderer, aided by criminal cronies who were at the Bilbo party hours before the murder. The Commonwealth allowed Frazier and other witnesses brawled violently at that party, but claimed they then went quietly home to bed, not to Worthington's house, a place known to Frazier through his employment at Magnum Movers. Frazier wielded the same type of weapon used to kill

Worthington when he attacked two tourists, shockingly similar criminal conduct that should have impeached him.

The Commonwealth also kept evidence about Frazier's minions, with him both during the Wellfleet attacks and the night Worthington was murdered. The extensive criminal records of these Commonwealth witnesses should have been produced. They were investigated by the same team handling the Worthington murder, disposed of before McCowen's trial: cocaine and marijuana possession, intimidating witnesses, breaking and entering, assault with a knife, operating under the influence, assault and battery by bludgeoning a blood-covered victim in the head and face with a beer bottle, assault and battery on a middle-aged stepmother, assault and battery on a girlfriend, home invasion and assault and battery with a dangerous weapon involving narcotics and a victim shot three times, and assault and battery with a knife on a woman. Some of these Commonwealth witnesses were called and others not. Almost all were seen with Frazier the night the prosecution claimed Worthington was murdered. The evidence was withheld despite specific requests.

The trial court's decision regarding the Commonwealth's failure to disclose the defects in the State Police Crime Laboratory presents an even more critical error. Contrary to the trial court's

conclusion, McCowen did far more than attack procedural delays in DNA testing. App. 560-61. As the defendant's motion clearly indicated, the Commonwealth knew that Robert Pino, the person who was involved in McCowen's DNA match, faced an investigation for misconduct and negligence at the time he processed McCowen's sample, but failed to disclose this information. The fact that the person who matched McCowen to the victim was accused of misconduct and incompetence likely would have materially influenced the jury's decision.

The Commonwealth's failure to disclose this information is particularly egregious given its constitutional obligation under the Confrontation Clause to call Pino as a witness. *Dungo*, 98 Cal. Rptr.3d at 712 (prosecution committed reversible error when it failed to call a discharged medical examiner who faced issues of incompetence and malfeasance); *see also, Melendez-Diaz*, 129 S. Ct. at 2538 ("the prosecution's failure to call [Pino] as a witness prevented the defense from exploring the possibility that he lacked proper training or had poor judgment or from testing his honesty, proficiency, and methodology"). Audits of the Police Crime Lab in 2001, 2003, and 2004, found mismanagement while this case's DNA samples were processed.

The trial court's denial of this motion speaks for itself. App. 551. The judge noted the Commonwealth turned over 388 reports, suggesting the defense was trolling and hadn't specifically requested Frazier's criminal history. App. 554. "A prosecutor cannot always know that…evidence is or might be exculpatory," he wrote, adding that the attack would not have been admitted because "opening a pocket knife in defiance of two men in an innocuous argument is hardly congruent with the brutal stabbing of Christa Worthington." App. 557. This posture is wrong.

The Commonwealth preserves the defendant's right to the judgment of his peers. This judge's view of the record is not at issue, only what would have happened if the jury had heard the exculpatory evidence. The jury's role is critical so when the withheld evidence was specifically requested, defendant need only demonstrate a substantial basis for claiming prejudice. *Commonwealth v. Gallarelli*, 399 Mass. 17, 20-22 (1987); *Commonwealth v. Wilson*, 381 Mass. 90, 109 (1980). The prosecution's state of mind is irrelevant; due process demands a new trial when a defendant is deprived of exculpatory evidence. McCowen specifically requested the evidence and need only demonstrate "that a substantial basis exists for claiming prejudice from the nondisclosure." *Commonwealth v. Tucceri*, supra at 412; *Commonwealth v.*

Schand, 420 Mass. 783, 787-88 (1995). This Court has established specific standards to deal with prosecutorial nondisclosure. *Tucceri*, 412 Mass. at 406-08.

The trial court conducted its own investigation and opined on the validity of evidence, wrongly acting as a prosecutor instead of addressing the critical issue. The prosecution withheld vital exculpatory evidence; a new trial is the only possible remedy.

VI. THE COURT ERRED IN DENYING DEFENDANT'S MOTION TO DISMISS THE INDICTMENTS BEFORE AND AFTER TRIAL.

McCowen moved to dismiss the indictments before trial for one reason, after trial for another. App. 568, Tr. 2778-83. A grand juror knew the victim, her daughter and the child's father, a suspect, reporting the conflict only after the indictments were returned. App. 568. McCowen's motion to dismiss on that basis was denied before trial. App. 21-22. No statute defines grand jurors' duties, which must be gleaned from the oath of office, an oath violated here. *G.L. c. 213, §5. Commonwealth v. Woodward*, 157 Mass. 516, 517-18 (1893) controls: "[e]vils … would arise if a general practice were to spring up of importuning grand jurors privately in favor of or against the finding of indictments. If this were done on one side, it might also be done on the

other; if with one grand juror, then with all; if by one person, then by many persons; if in one case, then in all cases."

Grand jurors hear evidence only in support of the charge and ought never to hear any other evidence than that produced by the government. This juror knew the victim, her daughter, and suspect Tony Jackett, but hid her personal ties, sat on the grand jury, and voted to indict McCowen. When she belatedly revealed the conflict in camera, she admitted being so traumatized by gruesome crime scene photos that she missed work and sought counseling. This "extraordinary circumstance" demanded action; the indictments should have been dismissed before trial. *Commonwealth v. Freeman*, 407 Mass. 279, 282 (1990) citing *Commonwealth v. Lammi*, 310 Mass. 159, 163-64 (1941).

During trial, Frazier falsely claimed he had (1) no criminal record and (2) a solid alibi, having spent the night and morning of January 4-5, 2002 at Shawn Mulvey's Eastham home. Tr. 2110-2113. The Commonwealth knew that Mulvey had initially denied it, yet allowed Frazier to feed his clean version to the grand jury. After Mulvey's trial testimony, McCowen moved to dismiss the case for the withholding of Mulvey's claim of ignorance of Frazier's alibi when police first interviewed him from

the grand jury, a motion never resolved by the court, which was clear error. Tr. 2778-2783,3675-77. It is axiomatic that an indictment premised upon knowingly false testimony cannot stand. *Commonwealth v. O'Dell*, 392 Mass. 445, 446-449 (1984). For this reason as well, this Court should reverse these convictions.

VII. MEDIA FRENZY MANDATED CHANGE OF VENUE/SEQUESTRATION.

The trial court erred in refusing to change venue, or sequester, ignoring the disastrous impact lurid publicity would and did have on this case. See *Commonwealth v. Angiulo*, 415 Mass. 502, 515 (1993); *Commonwealth v. Jackson*, 388 Mass. 98, 109 (1983); Tr. 35. Seldom has a case so divided a community, or so stoked pre-trial publicity, as this one. A case should be transferred "to another division or county…if the court is satisfied that there exists in the community where the prosecution is pending so great a prejudice against the defendant that he may not there obtain a fair and impartial trial." *Mass. R. Crim. P. 37(b)(1).*

Pre-trial publicity about McCowen never waned. Upon his arrest, the prosecution issued a "SOLVED" poster, plastered on its website right up to the start of the trial. Media coverage cast McCowen, a black man in a decidedly white community, in a "highly unfavorable light." *Commonwealth v. Bianco*, 388 Mass. 358, 367

(1983). The trial court's media packet proved the point, yet it refused to change venue or sequester. Tr. 35. Media frenzy ran at fever pitch during trial, when the jury was not sequestered, was watching TV news, reading about the prosecutor's nomination as a judge on the front page, and conversing out of court about the case as four jurors admitted during post-trial hearings.

These abhorrent crimes, their devastating impact on so many Cape Codders, and the negative way McCowen was repeatedly portrayed by local media made it impossible to seat a panel of impartial, indifferent jurors in Barnstable County. The case should have been transferred to protect his right to a fair trial. U.S. Const. Amend. 14; *Irvin v. Dowd*, 377 U.S. 717, 722 (1961). When failure to change venue abrogates this fundamental right, due process is violated, see *Groppi v. Wisconsin*, 400 U.S. 505 (1971); *Rideau v. Louisiana*, 373 U.S. 723 (1963), especially when accusations are "so shocking and repellent in the crime or the circumstances as to suggest that community opinion might be set against the person accused." *Commonwealth v. Blackburn*, 354 Mass. 200, 204 (1968); *Commonwealth v. Smith*, 353 Mass. 487, 489-90 (1968). Ghastly publicity raged before, during and after McCowen's motion which the court tried to handle unsuccessfully. Tr. 3769-3770. Its denial abrogated due

process. Change of venue, jury selection from another county, or sequestration should have been ordered. See *Commonwealth v. Aldoupolis*, 390 Mass. 428 (1983).

VIII. THE COURT ERRED IN THE RESTRICTION OF DR. BROWN'S TESTIMONY AND ADMISSION OF BAD ACTS EVIDENCE.

It has been stated "[h}ow far the cross-examination of a witness may be deemed helpful and relevant … as well as to what extent the accuracy, veracity or credibility of witnesses may be tested, must be left largely to the sound discretion of the presiding judge, and is not open to revision, unless … such discretion has been exercised in a way that results in the prejudice of a party … by reason … of too narrow restriction or too great breadth of inquiry. *Commonwealth v. Vardinski*, 438 Mass. 444 (2003); *Commonwealth v. Civello*, 39 Mass. App. Ct. 373 (1995). However,"[c]ross- examination for the purpose of showing falsity of other testimony of the witness or bias and prejudice on his part is a matter of right." *Commonwealth v. Russ*, 232 Mass. 58, 79 (1919). The court may not bar examination about material matters, even if it elicits testimony not otherwise admissible.

The prosecutor asked psychologist Eric Brown about McCowen's ability to sketch the interior of Worthington's home during his interrogation. Tr. 3286-87,3291-3306.

These questions opened the door to a portion of Dr. Brown's interview with McCowen, but the court erroneously precluded re-direct on that issue, leaving the jury with the impression that McCowen knew the home because he committed the crime. Circumstances surrounding that sketch were material, not collateral. See *Russ*, supra. Yet when defense counsel attempted to address the issue, the trial court shut him down, then went further, daring McCowen to take the stand instead of trying to "back-door" evidence of his consensual sexual relationship with the victim and presence in the home before her death. Tr. 3306,3328-3330. This blatantly adversarial behavior was an abuse of discretion, resulting in "the prejudice of a party...by...too narrow restriction...of inquiry." *Vardinski*, supra. It "went to the heart of the defense," *Civello*, supra. It was clear, reversible error.

The trial court also erred when it allowed Detective Mason to testify that prior restraining orders influenced his arrest of McCowen for murder, taunting that the defense had "made [its] own bed." Tr. 2025. Prior misconduct may not be admitted to prove a propensity to commit an indicted offense. *Commonwealth v. Chalifoux*, 362 Mass. 811, 815-16 (1973). This highly prejudicial evidence is not admissible to establish general criminal tendency or bad character. *Commonwealth v. Turner*, 393

Mass. 685, 688 (1985); *Commonwealth v. Leavitt*, 17 Mass. App. Ct. 585, 590-92 (1984). The prohibition applies to misconduct not "amounting to indictable crimes." *Commonwealth v. Spare*, 353 Mass. 263, 266-67 (1967); *Commonwealth v. Homer*, 235 Mass. 526, 534-35 (1920). No exception applies here.

Even if an exception did apply, the evidence is inadmissible where its prejudicial impact outweighs probative value. *Commonwealth v. Errington*, 390 Mass. 875, 881-82 (1984) "[S]imilarity of the other bad acts evidence to the charged offenses increases the danger that the jury will confuse the issues necessary to convict the defendant." *United States v. Lavelle*, 751 F.2d 1226, 1275, 1278 (D.C. Cir. 1985). The trial court erred when it ruled the defense "opened the door" by asking why Mason arrested McCowen. Mason's non-response recited five non-criminal domestic incidents in McCowen's past, evidence ruled inadmissible during pre-trial motions. App. 13,93-99. Defendants should not be required to defend against prior bad acts, accusations not set forth in the indictments. *Commonwealth v. Banuchi*, 335 Mass. 649, 654 (1975); *Commonwealth v. Holmes*, 157 Mass. 223, 239-40 (1982). The admission of prior bad acts in this case was error.

IX. THESE VERDICTS SHOULD BE REVERSED PURSUANT TO G.L. c. 278, §33E.

When reviewing a capital case, this Court must scrutinize the law and facts to insure a just result. *G.L. c. 278, §33E; Commonwealth v. Toney, 385 Mass. 575 (1982)*. The standard of review is broad, *Commonwealth v. Chaisson*, 383 Mass. 183 (1981), enabling this Court to decide these verdicts were rendered against the weight of the evidence, in the non-technical sense, and prevent a miscarriage of justice. *Commonwealth v. Almon*, 387 Mass. 599 (1982); *Commonwealth v. Cartagena*, 386 Mass. 285 (1982). McCowen's constitutional right to a fair trial by an impartial jury was here violated repeatedly. His convictions are a miscarriage of justice and must be reversed. *Commonwealth v. Wright*, 411 Mass. 678, 681 (1992); *Commonwealth v. Sylvester*, 400 Mass. 334, 336 (1987). Extraordinary intervention is warranted by the foregoing and by the following facts.

McCowen moved to suppress DNA test results because his probation officer Joseph Casey called him to his office about an unrelated matter and basically forced McCowen to submit. McCowen's consent was not consent at all; results from that swab should have been excluded. *Commonwealth v. Selby*, 420 Mass. 656, 663 (1995); *Commonwealth v. Williams*, 388 Mass. 846,856 (1984). App.

562. The Commonwealth must prove beyond a reasonable doubt based upon a "totality of the circumstances … that the defendant's [submission to a DNA swab] was a free and voluntary act and was not a product of inquisitorial activity which had overborne his will." *Williams*, supra at 856. Casey's authority over this borderline retarded probationer prevented a clear, intelligent decision and this submission was the result of "tactics used by the police, the details of the interrogation," and his easily overborne will. *United States v. Rohrbach*, 813 F.2d 142, 144 (8th Cir. 1987).

Reasonable examination of Richard Ofshe, a prominent expert on false confessions, should have been allowed. When Ofshe tried to address the 27-page report on McCowen's non-taped custodial interview, the court cut him off, arguing it was the jury's job, not his, to parse the all-important report. This abuse of discretion prejudiced "a party to the cause by reason... of too narrow restriction... of inquiry." *Vardinski*, supra; *Commonwealth v. Sansone*, 252 Mass. 71 (1925). Complicated issues and interrogation techniques used on McCowen could best be explained by an expert. Jurors would not have this knowledge any more than they'd understand DNA without expert testimony. The report on the unrecorded interview was open to question; Ofshe's

job was to help jurors understand it, testimony that "went to the heart of the defense." *Civello*, supra.

Dr. Richard Saferstein criticized the Commonwealth's failure to test critical evidence: semen from the victim's outer genital area; hairs from the body matching neither her nor McCowen; fibers on the body; hairs at the crime scene; blood on a hand mitt, towel, bathroom rug and sink; unidentified DNA under the victim's fingernails. These failings poison the verdicts. Tr. 3068.

The seizure of Hicks's call to Juror Huffman, without process, was improper. No legitimate security or disciplinary concerns existed to trump the Fourth Amendment and Article 14 rights of Hicks, a pre-trial detainee presumed innocent, or Huffman. A prison inmate retains some Fourth Amendment rights, including residual privacy rights consistent with prison objectives. *Bell vs. Wolfish*, 441 U.S. 520 (1979); *Turner v. Safley*, 482 U.S. 78, 89 (1987); *Cacicio v. Secretary of Pub. Safety*, 422 Mass. 764, 769-771 (1996); *Commonwealth vs. Dubose*, (SUCR2007-10019 2/25/08). In *Commonwealth v. Buccella*, 434 Mass. 473, 485 (2001) this Court held:

> Although institutional security concerns may outweigh a detainee's privacy rights and permit monitoring of a detainee's telephone calls by the sheriff, it does not follow that a detainee can have no subjective expectation of privacy with regard to other governmental

officials ... To the contrary, we have previously said that where materials 'are entrusted to a government entity, under some degree of compulsion, for a limited purpose that would not normally entail disclosure to others,' it would 'appear reasonable' to expect that the government entity will use the items 'solely for the purposes intended and not disclose them to others in ways that are unconnected with those intended purposes.

No institutional concerns of the Barnstable Jail justified seizing the calls in this case. Tr. 3789-93.

For all of the foregoing reasons, defendant invokes this Court's discretionary remedial powers under G.L. c. 278 §33E and asks that his convictions be reversed.

CONCLUSION

For any, some, or all of the foregoing reasons, Defendant-Appellant McCowen asks this Court to **REVERSE** his convictions and remand his case to Superior Court for a new trial.

Respectfully submitted,
CHRISTOPHER M. McCOWEN
By his attorney,

Robert A. George, Esquire
BBO# 189400
111 Huntington Avenue
Boston, Massachusetts 02199
617-262-6900

ON THE BRIEF:
Meghan E. George
Pepperdine Law School
Class of 2010

Gary G. Pelletier, Esquire
BBO# 631732
Four Longfellow Place
Boston, Massachusetts 02114
617-227-2800